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IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY and  
 DESERT SURVIVORS,

Plaintiffs,

v.

U.S. BUREAU OF LAND MANAGEMENT,  
 DIRK KEMPTHORNE, Secretary of the  
 Interior, DEPARTMENT OF THE ARMY, and  
 Brigadier General Dana J.H. Pittard in his  
 official capacity as the Commanding General for  
 the Department of the Army's National Training  
 Center and Fort Irwin,

Defendants.

No. 08-CV-3176-SI

**FEDERAL DEFENDANTS' NOTICE  
 OF MOTION AND MOTION TO  
 DISMISS, OR IN THE  
 ALTERNATIVE, TRANSFER VENUE**

Date: October 3, 2008  
 Time: 9:00 a.m.  
 Judge: Hon. Susan Illston  
 19th Floor, Courtroom 10

**Notice of Motion and Motion to Dismiss, or in the Alternative, Transfer Venue**

PLEASE TAKE NOTICE that Federal Defendants' motion to dismiss, or in the  
 alternative, transfer venue will be heard on October 3, 2008 at 9:00 a.m.

**I. STATEMENT OF THE ISSUE TO BE DECIDED**

Defendants U.S. Bureau of Land Management (“BLM”), Dirk Kempthorne, in his official capacity as U.S. Secretary of Interior, U.S. Department of the Army (the “Army”), and Dana J.H. Pittard, in his official capacity as the Commanding General for the Department of the Army's National Training Center and Fort Irwin (“Federal Defendants,” collectively), respectfully move the Court pursuant to Federal Rule 12(b)(3) to dismiss this action for improper venue. As explained more fully below, the Northern District has no connection to this lawsuit. Federal Defendants do not reside in the Northern District, no events or omissions giving rise to Plaintiffs’ claim have, or will occur in the Northern District, and, upon information and belief, no Plaintiff resides in the Northern District. The Court therefore should dismiss this action for improper venue. A proposed Order is attached.

Should the Court find that dismissal is not appropriate, the Court should, in the interests of justice, transfer the case pursuant to 28 U.S.C. § 1404 to a more proper venue where it could have been filed originally, preferably to the Central District of California, or alternatively to the District of Columbia.

**II. BACKGROUND**

This action concerns the planned expansion of the Army’s National Training Center at Fort Irwin, located approximately 37 miles northeast of Barstow, California in the High Mojave Desert. The National Training Center at Fort Irwin is a world class training center known for its excellent desert training. The Center's mission is to provide realistic arms training in multi-national venues in a contemporary operating environment, with a goal of improving the force and preparing for success in the global war on terrorism and future joint battlefields. To mitigate for the expansion of the Training Center, the Army has acquired some 100,000 acres of formerly-private land that is located within the designated critical habitat for the desert tortoise, *Gopherus agassizii*, a threatened species under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.* See 55 Fed. Reg. 12178 (Apr. 2, 1990). The Mojave population of desert tortoise

1 includes all tortoises north and west of the Colorado River in California, southern Nevada,  
 2 southwestern Utah, and northwestern Arizona. *Id.* Pursuant to ESA § 7(a)(2), the U.S. Fish and  
 3 Wildlife Service (“FWS”) issued a biological opinion on the effects of the Army’s planned  
 4 translocation of desert tortoises from the expansion area of Fort Irwin to the newly-acquired  
 5 lands, which concluded that the planned translocation was not likely to jeopardize the continued  
 6 existence of the tortoise and was not likely to result in adverse modification of the tortoise’s  
 7 critical habitat.

8 Plaintiffs’ lawsuit challenges the Army’s plan to resume translocation of the tortoises  
 9 pursuant to contracts with the U.S. Geological Survey (“USGS”) and I.T.S. Corporation. In  
 10 particular, Plaintiffs allege that the Army and the U.S. Bureau of Land Management (“BLM”)  
 11 are required to engage in further ESA § 7 consultation with FWS on the potential effects of the  
 12 translocation in light of new scientific information. Plaintiffs further allege that the Army is  
 13 required to consult with FWS pursuant to ESA § 7(a)(2) and complete analysis under the  
 14 National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, should the Army transfer  
 15 management responsibility for the newly-acquired lands to BLM. Plaintiffs ask the Court to,  
 16 among other relief, enjoin the transfer of management authority to BLM, any further  
 17 translocation of tortoises, and any activities that could cause “take” of desert tortoises, including  
 18 the use of off-road vehicles, until the additional ESA and NEPA analyses have been completed.  
 19 Compl., Prayer for Relief ¶¶ 9-11.

### 20 **III. ARGUMENT**

#### 21 **A. The Northern District of California is an Improper Venue for this Case.**

22 Pursuant to 28 U.S.C. § 1391(e), civil actions against federal officers and agencies may  
 23 be brought:

24 [In] any judicial district in which (1) a defendant in the action resides, or (2) a  
 25 substantial part of the events or omissions giving rise to the claim occurred, or a  
 26 substantial part of property that is the subject of the action is situated, or (3) the  
 plaintiff resides if no real property is involved in the action.

27 28 U.S.C. § 1391(e).

1 In addition, the ESA includes a venue provision that allows suits brought under the  
2 citizen suit provision to be filed "in the judicial district in which the violation occurs." 16 U.S.C.  
3 § 1540(g)(3)(A). The ESA venue provision supplements the general venue statute. *See*  
4 *Northwest Forest Resource Council v. Babbitt*, No. 93-1579-JHG, 1994 WL 908586, \*2 (D.D.C.  
5 Apr. 13, 1994) ("the statute permits—but does not require—a lawsuit to 'be brought in the judicial  
6 district in which the violation occurs'"). In the instant matter, none of the above factors is  
7 present to establish venue in the Northern District of California.

8 First, upon information and belief, no Plaintiff resides in the Northern District of  
9 California. Plaintiff Desert Survivors apparently resides in Vallejo, California, within Solano  
10 County, which is within the jurisdiction of the Eastern District of California. *See* Ex. A attached  
11 hereto. Plaintiff Center for Biological Diversity resides in New Mexico. *See* Ex. B attached  
12 hereto. As such, Plaintiffs' residences do not establish venue in the Northern District.

13 Second, no Defendants reside in the Northern District. Fort Irwin is located in San  
14 Bernardino County, and as such General Pittard resides in the Central District. The U.S.  
15 Department of the Army is headquartered in the Pentagon, located in the Eastern District of  
16 Virginia. The Secretary of the Interior, the proper defendant on behalf of BLM, resides in  
17 Washington, D.C. *See Lamont v. Haig*, 590 F.2d 1124, 1128 n.19 (D.C. Cir. 1978) (for the  
18 purposes of section 1391(e)(1) "[w]hat controls is the official residence of the federal defendant  
19 where the official duties are performed"); *see also Williams v. United States*, No.  
20 C-01-0024-EDL, 2001 WL 1352885, \*1 (N.D. Cal. Oct. 23, 2001) (noting that "[f]or purposes of  
21 venue, all federal defendants reside in Washington, D.C." and that "[v]enue does not lie in every  
22 judicial district where a federal agency has a regional office").

23 Third, the subject of, and the operative events giving rise to, Plaintiffs' claim are located  
24 outside of the Northern District of California. Specifically, Fort Irwin and the majority of the  
25 desert tortoise's critical habitat in California are located within the Central District of California.  
26 59 Fed. Reg. 5820 (Feb. 8, 1994). Remaining portions of the tortoise's designated critical  
27

1 habitat within California are located in San Bernardino, Los Angeles, Riverside, Imperial and  
2 Kern counties. *Id.* No designated critical habitat is located within any county in the Northern  
3 District of California. As the court noted in *Forest Guardians v. Kempthorne*, No. 06-cv-2560-L  
4 (LSP), 2007 WL 2572287, at \*1 n.2 (S.D. Cal. Sept. 5, 2007), "[t]he location of the species that  
5 is the subject matter of ESA lawsuits is routinely considered in venue challenges."

6 In sum, the Northern District of California has no connection to this lawsuit to establish  
7 venue under 28 U.S.C. § 1391(e) or the ESA's venue provision, 16 U.S.C. § 1540(g)(3)(A).  
8 Neither Plaintiffs nor Federal Defendants reside in the Northern District. Furthermore, neither  
9 the events complained of, nor the subject of, the action are located within the Northern District.  
10 The Court therefore should dismiss Plaintiffs' lawsuit for improper venue pursuant to Federal  
11 Rule 12(b)(3).

12 **B. The Interest of Justice Weigh in Favor of Transfer to the Central District of**  
13 **California.**

14 As explained above, this case should be dismissed because the Northern District is an  
15 improper venue. However, if the Court were to find a connection exists in this case to the  
16 Northern District, the interests of justice strongly favor a transfer of venue pursuant to 28 U.S.C.  
17 § 1404. Section 1404 authorizes the Court to transfer this case to a district where it might have  
18 been brought "for the convenience of parties and witnesses, in the interest of justice." The  
19 decision whether to transfer under section 1404(a) is committed to the sound discretion of the  
20 district court and should be exercised in light of all the circumstances of a case. *Decker Coal*  
21 *Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986); *Piper Aircraft Co. v.*  
22 *Reyno*, 454 U.S. 235, 257 (1981). Whether venue should be transferred in any given case  
23 depends on "individualized, case-by-case consideration of convenience and fairness." *Van*  
24 *Dusen v. Barrack*, 376 U.S. 612, 622 (1964). The only prerequisite to the Court's exercise of  
25 discretion is the requirement that the new forum be a district or division where the case "might  
26 have been brought." 28 U.S.C. § 1404(a).

27 In deciding whether to transfer a case pursuant to § 1404(a), courts may take into

1 consideration private and public interest factors affecting the convenience of the forum. The  
2 private factors include the "relative ease of access to sources of proof; availability of compulsory  
3 process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;  
4 possibility of view of premises, if view would be appropriate to the action; and all other practical  
5 problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp. v. Gilbert*,  
6 330 U.S. 501, 508 (1947). Public factors weighed by the court include, "the administrative  
7 difficulties flowing from court congestion; the 'local interest in having localized controversies  
8 decided at home;' the interest in having the trial of a diversity case in a forum that is at home  
9 with the law that must govern the action; the avoidance of unnecessary problems in conflict of  
10 laws, or in the application of foreign law and the unfairness of burdening citizens in an unrelated  
11 forum with jury duty." *Piper Aircraft Co.*, 454 U.S. at 241 (quoting *Gulf Oil Corp.*, 330 U.S. at  
12 509).

13 Of these factors, the interests of having "local controversies decided at home" emerges as  
14 most significant in the instant action. As stated above, Fort Irwin, the desert tortoise population,  
15 and its critical habitat in California are found in the Central District of California. Thus, the  
16 Central District is the local forum that will be impacted most by resolution of this litigation, and  
17 it is a venue where this lawsuit could have been brought pursuant to § 1391(e)(2). See *Southern*  
18 *Utah Wilderness Alliance v. Norton*, 315 F. Supp. 2d 82, 88 (D.D.C. 2004) ("Land is a localized  
19 interest because its management directly touches local citizens."); *Trout Unlimited v. U.S. Dept.*  
20 *of Agriculture*, 944 F. Supp. 13 (D.D.C. 1996) ("Controversies should be resolved where they  
21 arise."); *McCrary v. Gutierrez*, No. 06-cv-0086, 2006 WL 1748410 (E.D. Cal. June 23, 2006)  
22 (transferring case from Eastern District of California to Northern District of California where  
23 species was located entirely in Northern District); *Nez Perce Tribe v. NOAA*, No. 04-CV-60-RE,  
24 2004 WL 1179333, at \*3 (D. Or. May 27, 2004) (transferring challenge to decision under ESA  
25 where "greater local interest in the issues raised in this lawsuit exists in Idaho").

26 Although this case "could have been brought" in the District of Columbia or the Eastern  
27

District of Virginia pursuant to § 1391(e)(1), based on the Secretary of Interior's and the Army's respective residences, or in the Eastern District of California or the District of New Mexico based on Plaintiffs' residences, transferring the case to the Central District of California would best serve the interest of justice for the reasons explained above. Plaintiffs' choice of venue is entitled to no deference when, as in this case: (1) Plaintiffs do not reside in the forum in which they filed suit; (2) their claim arose elsewhere; (3) there is a local interest in having localized controversies decided at home; (4) Federal Defendants prefer a different forum; and (5) the ease of access to sources of proof favors transfer. *Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968) (plaintiff's choice of forum "entitled only to minimal consideration" when "the operative facts have not occurred within the forum of original selection and that forum has no particular interest in the parties or the subject matter") (citations omitted); *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987); *Carolina Casualty Co. v. Data Broad. Corp.*, 158 F. Supp.2d 1044, 1048 (N.D. Cal. 2001) (deference to plaintiff's choice of forum is "substantially reduced where the plaintiff's venue choice is not its residence or where the forum lacks a significant connection to the activities alleged in the complaint"); *Jarvis v. Marietta Corp.*, No. CV-98-4951-MJJ, 1999 WL 638231, \*3 (N.D. Cal. Aug. 12, 1999); *Saleh v. Titan Corp.*, 361 F. Supp.2d 1152, 1155-56 (S.D. Cal. 2005). Indeed, this Court recently transferred an ESA case to the Central District of California despite the fact that a plaintiff resided in the Northern District because the species at issue in the case was located in the Central District, and the case had very little connection to the Northern District. *California Trout, Inc. et al. v. Kempthorne, et al.*, No. C 07-05798 SI (July 21, 2008 Order, copy attached hereto as Ex. C).

## V. CONCLUSION

In sum, there is simply no nexus to establish venue in the Northern District of California in this case, and as such the case should be dismissed. However, even if the Court were to find dismissal is not appropriate, the interests of justice weigh heavily in favor of transferring this case to the Central District of California, the venue where the subject of this lawsuit is located,

1 where a substantial part of the events or omissions giving rise to the claim occurred, and where  
2 the impacts of the Court's resolution of this case will be felt.

3  
4 Respectfully submitted: August 11, 2008

5  
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Assistant Attorney General  
Environment & Natural Resources Division

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10 /s/ Robert P. Williams  
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Corporation		
DESERT SURVIVORS		
Number: C1255691	Date Filed: 8/28/1984	Status: active
Jurisdiction: California		
Address		
401 STINSON ST 8		
VALLEJO, CA 94591		
Agent for Service of Process		
ALAN SIRACO		
2777 YULUPA AVE PMB 169		
SANTA ROSA, CA 95405		

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## Corporations

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Corporation		
CENTER FOR BIOLOGICAL DIVERSITY, INC.		
Number: C2413510	Date Filed: 4/19/2002	Status: active
Jurisdiction: NEW MEXICO		
Address		
PO BOX 710		
TUCSON, AZ 85702		
Agent for Service of Process		
ADAM KEATS		
1095 MARKET ST STE 511		
SAN FRANCISCO, CA 94103-1628		

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA TROUT, INC; CALIFORNIA-  
NEVADA CHAPTER OF THE AMERICAN  
FISHERIES SOCIETY; CENTER FOR  
BIOLOGICAL DIVERSITY; and FRIENDS OF  
THE RIVER,

Plaintiffs,

v.

DIRK KEMPTHORNE, Secretary of the Interior;  
and H. DALE HALL, Director, U.S. Fish and  
Wildlife Service,

Defendants.


No. C 07-05798 SI

**ORDER GRANTING DEFENDANTS'  
MOTION TO TRANSFER VENUE TO  
THE CENTRAL DISTRICT OF  
CALIFORNIA**

Defendants have filed a motion to transfer venue to the Central District of California. The motion is scheduled for hearing on July 25, 2008. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral argument, and hereby VACATES the hearing. The Court finds that the prior cases decided in this district do not involve the same legal issues as those raised by the current action, *see California Trout v. Babbitt*, No. 95-3961 SI; *California Trout v. Norton*, No. 97-3779 SI, and that the action has very little connection to this district, as compared to the substantial ties to the Central District of California. For these reasons, the Court hereby GRANTS defendants' motion to transfer venue [Docket No. 18].

**IT IS SO ORDERED.**

Dated: July 21, 2008

  
\_\_\_\_\_  
SUSAN ILLSTON  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY and  
DESERT SURVIVORS,

Plaintiffs,

v.

U.S. BUREAU OF LAND MANAGEMENT,  
DIRK KEMPTHORNE, Secretary of the  
Interior, DEPARTMENT OF THE ARMY, and  
Brigadier General Dana J.H. Pittard in his  
official capacity as the Commanding General for  
the Department of the Army's National Training  
Center and Fort Irwin,

Defendants.

No. 08-CV-3176-SI

**[PROPOSED] ORDER GRANTING  
FEDERAL DEFENDANTS' MOTION  
TO DISMISS**

Having considered Federal Defendants' motion to dismiss, or in the alternative, transfer venue, Plaintiffs' opposition thereto, and Federal Defendants' reply, the Court concludes that and this action has no connection to this district.

Accordingly, IT IS HEREBY ORDERED that Federal Defendants' motion to dismiss is GRANTED. It is further ORDERED that this case should be, and hereby is, dismissed without prejudice for improper venue.

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_, 2008

SUSAN ILLSTON  
United States District Judge